Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison, *Petitioner*,

v.

FRED BERRE DOUGLAS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI FROM DENIAL OF MANDAMUS

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QUESTION PRESENTED

1. Does the failure to litigate or decide the allegations of a habeas corpus petition challenging a state capital judgment for over four years after issuing a stay of execution, violate principles of federal habeas corpus review of state criminal judgments?

2. Is a district court's duty promptly to decide a habeas corpus petition violated by the failure to litigate or decide the merits of the allegations of the petition challenging a capital judgment over four years after issuing a stay of execution?

3. Does the state's interest in the administration of criminal justice and finality of judgments dictate that the district court should issue an opinion in a capital case within 120 days of the filing of the answer?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. _____

ARTHUR CALDERON, Warden of San Quentin Prison, *Petitioner*,

v.

FRED BERRE DOUGLAS, *Respondent*.

Petitioners pray that pursuant to its appellate jurisdiction and the All Writs Act, (section 1651, subdivision (a) of Title 28 of the United States Code), certiorari be granted and a writ issue to compel the United States District Court to litigate and decide the habeas corpus petition filed on November 16, 1992, amended on January 19, 1994, and answered on April 18, 1994, in Douglas v. Calderon, CV 91-3055 RSWL. Stay of execution was issued on June 13, 1991, and the habeas corpus allegations have yet to be litigated or decided.

OPINION OR JUDGMENT BELOW

On May 10, 1995, the district court denied Petitioner's motion to decide the Petition for Writ of Habeas Corpus. Appendix A. On August 3, 1995, the United States Court of Appeals for the Ninth Circuit denied Petitioner's Petition for Writ of Mandate to the district Court. Appendix B.

A federal stay has been in effect since June 13, 1991.

STATEMENT OF JURISDICTION

This Court has jurisdiction under sections 1651, subdivision (a) and 2254 of Title 28 of the United States Code and Rule 20.1 of the United States Supreme Court Rules.

The district court has jurisdiction in Douglas' petition for writ of habeas corpus under sections 2241, subdivision (a) and 2254 of Title 28 of the United States Code.

STATEMENT OF THE CASE

Fred Berre Douglas is an inmate in California State Prison sentenced to be executed for the 1981 murders of two teenaged girls. After Douglas' direct appeal was rejected by the California Supreme Court (People v. Douglas, 50 Cal. 3d 486 (1990)) and the Petition for Writ of Certiorari was denied by this Court (Douglas v. California, 498 U.S. 1110 (1991)), Douglas initiated federal habeas corpus proceedings by requesting a stay of execution.

On June 13, 1991, a stay of execution was issued by the United States District Court for the Central District of California in Case No. CV-91-3055 RSWL. Douglas first sought appointment of counsel on June 6, 1991, and attorneys were appointed for him on November 8, 1991. His first petition for habeas corpus, filed on November 16, 1992, contained a mixture of exhausted and unexhausted claims. The district court

granted Douglas the opportunity to return to the state court to exhaust all his claims.

Douglas filed a state habeas petition (his second) with the California Supreme Court, which was denied on the merits on October 13, 1993. He filed his amended petition in the district court on January 19, 1994, and petitioner filed an answer on April 18, 1994. Douglas filed a traverse followed by a motion for evidentiary hearing which was taken under submission on November 14, 1994. No decision has issued. Petitioner filed a motion to decide the petition for writ of habeas corpus which was denied on May 10, 1995. Appendix A.

Our petition for writ of mandate in the Ninth Circuit Court of Appeals was denied on August 3, 1995, after the court ordered and received an opposition from the Real Party in Interest. Appendix B.

SUMMARY OF ARGUMENT

The district court's unreasonable delay in litigating or deciding douglas' petition for habeas corpus in this capital case violates the due process rights of California and the state's ability to timely enforce its laws

The district court issued Douglas a stay on June 13, 1991. While there is no deadline for decision by the district court in habeas corpus, the delay in this case is per se unreasonable under In re Blodgett, 502 U.S. ___, 112 S. Ct. 674, 676, 116 L. Ed. 2d 669 (1992). The state is deprived of its sovereign power to enforce its criminal laws by unreasonable delay in deciding this and other capital cases.

A federal stay of execution issued in this case over four years ago and remains in effect. The petition was filed, amended after exhaustion and answered. A request for an evidentiary hearing was made and opposed and remains now nine months later undecided.

Over four years after the stay -- the allegations of the petition remain unlitigated and undecided.

ARGUMENT

BECAUSE THE DISTRICT COURT HAS GRANTED A STAY OF EXECUTION IN THIS CAPITAL CASE, IT HAS A DUTY TO TAKE ALL STEPS NECESSARY TO INSURE THE PROMPT RESOLUTION OF THE CASE, WHICH HAS NOT BEEN FULFILLED

Under the All Writs Act, 28 U.S.C. § 1651(a), this Court, as a federal court, may issue a Writ of Mandamus when it is "necessary or appropriate in aid of their respective jurisdictions." Will v. Calvert Fire Insurance Company, 437 U.S. 655, 661 (1978) plurality opinion; Roche v. Evaporated Milk Ass'n., 319 U.S. 21 (1943). This Court has long recognized this authority, and stated when it should be used.

> Application for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refused to hear and decide the controversy, or where such a court, having heard the case,

> refuses to render judgment or enter a decree in the case.

Ex Parte Newman, 81 U.S. (14 Wall.) 152, 165 (1872).

Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a Writ of Mandamus when it shows that the court has abused its discretion. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 84-85 (1970); La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957).

Recognizing these principles, the Eighth Circuit recently issued a writ of mandamus requiring a district court to decide two long delayed capital cases within 180 days of the order. Hopkins v. Maryland, 59 F.3d 102 (8th Cir. 1995) 102. This Court has said that issuance of a writ of mandamus will be appropriate in exceptional cases involving stay orders. Gulfstream Aerospace Corp. v. Mayacamas Corp. 485 U.S. 271, 288, fn. 13 (1988). This case presents exceptional circumstances because it has not received priority.

This Court has advised federal courts to resolve collateral attacks on capital cases promptly with due consideration of the issues.

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, 502 U.S. ___, 112 S. Ct. 674, 676, 116 L. Ed. 2d 669 (1992), emphasis added. Petitioner maintains that the district court has abused its discretion in this case by not following the dictates of Blodgett and promptly resolving the petition before it.

While the district court correctly pointed out in its May 10, 1995, order that it must review over 4,000 pages of trial transcript, a 170 page amended petition, a 246 page answer, totalling 357 pages with exhibits, and a 100 page traverse (Appendix A, at 3), the stay has been pending for over four years. The record of the

trial was filed with the district court on November 1, 1991, so that the district judge has had ample time to review it. The district court has undoubtedly entertained and resolved numerous other matters of lesser import from the standpoint of the interests of the parties and state -- in the last four years. (The United States defeated the Axis powers in less time.)

Habeas corpus "is a speedy remedy, entitled by statute to special preferential consideration to ensure expeditious hearing and determination." Van Buskirk v. Wilkinson, 216 F.2d 735, 737-738 (9th Cir. 1954).

Recently, the Ninth Circuit Court of Appeals stated its policy not to tolerate "extraordinary delay." Ironically, it allowed a state prisoner to bring his habeas corpus petition challenging the constitutionality of his conviction despite the fact that the state had not yet made a final ruling on his penalty phase and sentence. Phillips v. Vasquez, 56 F.3d 1030, 1035-1038 (9th Cir.

1995). Yet the Ninth Circuit denied the Warden's petition for writ of mandate in this case. Appendix B.

Here, Douglas was sentenced to death on April 5, 1985, for the murders of two teenagers. His conviction and sentence were affirmed by the California Supreme Court on April 2, 1990. People v. Douglas, 50 Cal. 3d 468, 268 Cal. Rptr. 126, 788 P.2d 640 (1990). His petition for certiorari was denied.[1/] Douglas v. California, 498 U.S. 1110 (1991).

On June 13, 1991, the district court issued a stay of execution and has yet to decide the petition for habeas corpus which Douglas filed on November 16, 1992, and amended on January 19, 1994. The delay in deciding the petition, to say nothing of the delay in ruling on Douglas' motion for an evidentiary hearing,

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1. A second petition challenging the constitutionality of California Penal Code section 190.3 was also denied. Douglas v. Calderon, ___ U.S. ___, 114 S. Ct. 2781 (1994). See Tuilaepa v. California, 512 U.S.___, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994); Proctor v. California, 512 U.S. ___, 114 S. Ct. 679, 126 L. Ed. 2d 646 (1994).

violates this Court's decision in Blodgett and carries with it the substantial likelihood that witnesses will die or disappear, memories will fade and evidence will become unavailable to defend this valid, final judgment of death. Phillips v. Vasquez, 56 F.3d at 1036.

A. This Case Meets the Guidelines Necessary for Issuance of Extraordinary Writ

In In re Cement Antitrust Litigation (MDL No. 296), 688 F.2d 1297 (9th Cir. 1982), the Ninth Circuit Court of Appeals explained in detail the guidelines it would use to determine whether a mandamus petition was an appropriate remedy in a particular case. The guidelines described include: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief they desire; and (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal. 688 F.2d at 1301, citing Bauman v. United States District Court, 557 F.2d 650, 654-655 (9th Cir. 1977), see also, Will v.

Calvert Fire Ins. Co. 437 U.S. at 661-662. The Ninth Circuit Court of Appeals refers to those five guides as the Bauman factors. In re Cement Antitrust Litigation (MDL No. 296), 688 F.2d at 1301. In In re Cement Antitrust, the Ninth Circuit Court of Appeals noted that related considerations included whether the injury alleged by the petition was not correctable on appeal; whether the petition presents an issue that would repeatedly evade appellate review; or whether "there are other compelling factors relating to the efficient and orderly administration of the district courts." 668 F.2d at 1301. Application of these factors is set forth in section B, below. Petitioner maintains that the district court has abused its discretion in this case by not following the dictates of Blodgett and promptly resolving the matters before it.

B. Mandate is the Only Available Means to Insure the Prompt Resolution of the Instant Case

A petition for writ of mandamus to a higher court is the appropriate action when an inferior court refuses to act on a case pending before it.

> There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calvert Fire Ins., 437 U.S. at 661-662, quoting Insurance Company v. Comstock, 83 U.S. (16 Wall.) at 270; Ex Parte Newman 81 U.S. (14 Wall.) at 165.

The State of California has no other available remedy to ensure a prompt resolution of this case except by relief through a Writ of Mandamus.

This Court has recognized the prejudice suffered by a state when a federal court refuses to act promptly on a habeas corpus petition.

> None of the reasons offered in the response dispels our concern that the State of

> Washington had sustained severe prejudice by the two-and-a-half year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [McCleskey v. Zant] when discussing the importance of finality in the context of federal habeas corpus proceedings

In re Blodgett, 112 S. Ct. at 676 (citation omitted, emphasis added). As with the State of Washington in Blodgett, California suffers an affront to its sovereign power when a federal court stays a state judgment and then refrains or delays ruling on a Petition for Writ of Habeas Corpus.

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a state to pass laws means little if the state cannot enforce them

McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991), emphasis added. The diminution of sovereignty is even greater for the State of California in this case because the federal district court has prevented the state from enforcing its criminal laws against Douglas

for over four years without adjudicating or deciding his allegations.

The State seeks a prompt decision of this matter.

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the objectiveness of underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McCleskey v. Zant, 113 L. Ed. 2d at 543, 111 S. Ct. at 1469, quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Har. L. Rev. at 452-453 (1963).

A court immobilized in its search for justice provides none. The district court's duty is not to achieve absolute certainty on the issues before it, but simply, after due consideration, to decide them.

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), emphasis added. Ever-delayed justice is no justice at all.

Condemned prisoners profit from delays and stays, prompting some courts to prohibit granting further stays by lower courts under certain circumstances. Steffen v. Tate, 39 F.3d 622, 626-628 and fn. 2 at 627 (6th Cir. 1994).

The condemned prisoner's goal of delay through habeas corpus litigation is expressly discussed in Steffen. Steffen, a state prisoner with no federal habeas corpus petition on file, obtained a stay from a district court. In an opinion reversing the decision and dissolving the stay, the Circuit Court of Appeals wrote:

> It would be a mockery of the limited role of federal courts in state criminal proceedings to allow federal courts simply to shut down the

> state capital-punishment process on the pretense that a habeas proceeding is 'pending.' There is no doubt that, so long as word processor and photocopier hold out, petitioners can continue to have proceedings pending in state court and to generate issues that have not been exhausted. The exhaustion requirement for federal habeas does not mean that petitioners can simply choose never to file a habeas so long as there is some additional contention that could be raised in state court. Thus, we hold that McFarland decision does not create a generalized repeal of the requirement that a habeas petition must be pending for a federal court to stay an execution. Rather, it holds only that in a limited situation where a truly unrepresented prisoner requires representation in order to prepare a competent habeas petition, a federal court is not devoid of jurisdiction to issue such an order in aid of that particular end.

Steffen, emphasis added at pp. 627-628; In re Parker, 49 F.3d 204, 206-213 (6th Cir. 1995). Just as it is "almost always in the interest of a death-sentenced prisoner to delay filing that petition as long as possible" (Steffen, at 625; Parker, at 211-212), delays in deciding the petition, once it is filed, benefit the prisoner. The state must, therefore, move for decision and seek a writ if that

motion is not successful. Stewart v. Peters, 878 F.Supp. 1139, fn. 2 at 1141-1142 (N.D.Ill. 1995).

California continues to suffer prejudice based on the district court's failure to act. Therefore, the state's right to a writ is "clear and indisputable." Mallard, 109 S. Ct. at 1822. The district court's explanation for the delay -- voluminous records -- is not persuasive.[2/] Ex. 1 at 3. At a minimum, the district court is continuing to violate the duty recognized by this Court in Blodgett. Furthermore, the problem of delays in capital habeas is an issue of great concern to the states that is repeated with such regularity in the Ninth Circuit and Central

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2. Douglas has a short trial record for a capital case and that record has been on file with the district court since November 1, 1991.

Any excuse based on current case load is unacceptable, and has been repeatedly rejected as a matter of law. McClellen v. Young, 421 F.2d at 691 (excessive volume of pending habeas petitions insufficient ground to justify delay in deciding them); see also Jones v. Shell, 572 F.2d 1278, 1280 (8th Cir. 1978) (busy court docket cannot justify 14-month delay in processing claim from date of remand). Any other result would render the holding of In re Blodgett a nullity.

District that public policy demands direction from this Court even if this case is decided after filing of this petition.

C. California Requests That This Court Exercise Its Supervisorial Authority and Establish a 120-Day Time Limit for Ruling on Habeas Corpus Petitions From Filing of the Answer

Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a writ of mandamus when it shows that the court has abused its discretion. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. at 84-85; La Buy v. Howes Leather Co., 352 U.S. at 257. In Blodgett, this Court stated that the federal courts had a duty in capital cases to "take all steps necessary to ensure a prompt resolution of the matter." 116 L. Ed. 2d at 676, 112 S. Ct. at 676, emphasis added. The Ninth Circuit Court of Appeals has taken the extreme step of declaring California's appellate process "ineffective" within the meaning of

section 2254(b), due to delay. Phillips v. Vasquez, 56 F.3d at 1036. Yet it denies writ of mandate to the states prevent undue delay in federal habeas.[3] See Appendix B; Lewis v. United States District Court of Arizona, 9th Circuit Case No. 93-70578 attached as Appendix C. Clearly, the district court has failed to follow the Blodgett mandate in this case.

No procedures or rules are in place to ensure compliance with Blodgett or Phillips. To redress this lack of guidance, respondent requests this Court order the district courts to rule within a specified time on a petition of habeas corpus in all pending capital cases once the briefing is complete.[4] The failure to decide

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3. By contrast, the Eight Circuit ordered a district court to decide the merits of two pending capital habeas petitions within 180 days after its order. Hopkins v. Maryland, 59 F.3d 102, 102.

4. A period of 120 days from the filing of the answer may be a reasonable guideline for decision. The local rules of the United States District Court for the Southern District of California contemplate a 120 day temporary stay "to allow newly appointed counsel to prepare and file the petition." West, Cal. Rules of Court, Federal, p. 675, LR 9.3b8c, habeas corpus and motions under § 2255.

a case within that time constraint would constitute a prima facie showing that the court has not complied with the Blodgett mandate. This direction would establish guidelines to be followed in every case, obviating the need to relitigate the issue in every pending capital case and continuously in each individual case. Long delays in deciding capital cases are recurring in the district courts within the Ninth Circuit. See Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), remanded Lewis v. Jeffers, 497 U.S. 764 (1990); Jeffers v. Lewis, 5 F.3d 1199 (9th Cir. 1992). Howard v. Calderon, CV 88-7240 WJR, stay issued 12/2/88; Thompson, T. v. Calderon, CV 89-3630 RG, stay issued 6/20/89, decision issued 5/30/95; Melton v. Calderon, CV 89-4182-RMT, stay issued 7/14/89; Brown v. Calderon, CV 90-2815-AWT, stay issued 6/1/90;

American Bar Association recommendations suggest a one year statute of limitations (beginning "upon completion of the state direct review process") for filing all post-conviction applications in capital work. It points out the United States Supreme Court resolves Petitions for Certiorari in 90 days if filed during the regular term and 120 days if filed during the summer. 40 Am. Univ. Law Rev. 1, Recommendation 13 (1990).

Silva v. Calderon, CV 90-3311-DT, stay issued 6/26/90; Robertson v. Vasquez, CV 90-4050-CDM, stay issued 9/7/90; and Thompson, R. v. Calderon, CV 90-6605-JMI, stay issued 12/5/90. Compare Hopkins v. Maryland, 59 F.3d at 102.

Long delays in decisions of capital habeas corpus appeals are also a recurring problem for prosecutors. Hamilton v. Vasquez, 17 F.3d 1149 (9th Cir. 1994); Wade v. Calderon, 29 F.3d 1302 (9th Cir. 1994).

The Blodgett mandate is clear -- federal courts must establish procedures and practices to ensure "prompt" resolution of habeas corpus petitions in capital cases. The district court below has failed to do so. Setting a time limit for ruling on a petition of habeas corpus would allow some flexibility, while providing assurances to the states that the current practice of

allowing capital cases to languish in the district courts for years before ruling will not be condoned or permitted.

This Court has long recognized the overriding policy of preventing federal interference with the state's fundamental interest in the administration of its own criminal justice system. Coleman v. Thompson, 501 U.S. 722 (1991); McCleskey v. Zant, 111 S. Ct. 1454; Teague v. Lane, 489 U.S. 288, 309 (1989); Francis v. Henderson, 425 U.S. 536, 539 (1976).

California believes that establishing a time limit for the district courts to rule on pending capital habeas corpus petitions is not only warranted, but absolutely essential to the orderly administration of justice.

CONCLUSION

For all of the above stated reasons, the State of California respectfully requests that the court grant a writ of certiorari to adopt time limits for the district court to render a decision and reverse and remand the Ninth Circuit's denial of mandamus.

Dated: September 6, 1995.

Respectfully submitted,

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No: _____
October Term, 1995

ARTHUR CALDERON, Warden,
San Quentin Prison, and

Petitioners,

v.

FRED BERRE DOUGLAS,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within PETITION FOR WRIT OF CERTIORARI WITH APPENDIX as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Justices Norris, Noonan & O'Scannlain

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 7th day of September 1995.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September 7th, 1995.

Anne Marie Buford
ANNE MARIE BUFORD

Subscribed and sworn to before me
this 7th day of September.

Christine J. Kaul
Notary Public in and for said County and State

PWR1 CHRISTINE J. KAUL Comm. # 1034176 NOTARY PUBLIC - CALIFORNIA San Diego County My Comm. Expires July 31, 1998 PWR1